

BEFORE THE
BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND GEOLOGISTS
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation against:

DAVID HARLAN LOWEN
145 North Melrose Drive, Suite 200
Vista, CA 92083

Civil Engineer License No. C 31915,

Respondent.

Case No. 897-A

DECISION

The attached Stipulated Settlement and Disciplinary Order is hereby adopted by the Board for Professional Engineers, Land Surveyors, and Geologists as its Decision in the above-entitled matter.

This Decision shall become effective on June 17, 2011.

IT IS SO ORDERED May 12, 2011.

Original Signed

BOARD FOR PROFESSIONAL ENGINEERS,
LAND SURVEYORS, AND GEOLOGISTS
Department of Consumer Affairs
State of California

1 KAMALA D. HARRIS
Attorney General of California
2 LINDA K. SCHNEIDER
Supervising Deputy Attorney General
3 DAVID E. HAUSFELD
Deputy Attorney General
4 State Bar No. 110639
110 West "A" Street, Suite 1100
5 San Diego, CA 92101
P.O. Box 85266
6 San Diego, CA 92186-5266
Telephone: (619) 645-2025
7 Facsimile: (619) 645-2061
Attorneys for Complainant

8
9 **BEFORE THE**
BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS,
10 **AND GEOLOGISTS**
DEPARTMENT OF CONSUMER AFFAIRS
11 **STATE OF CALIFORNIA**

12 In the Matter of the Accusation Against:

Case No. 897-A

13 **DAVID HARLAN LOWEN**
14 **145 North Melrose Drive, Suite 200**
Vista, CA 92083

STIPULATED SETTLEMENT AND
DISCIPLINARY ORDER

15 **Civil Engineer License No. C 31915**

16 Respondent.
17

18
19 IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-
20 entitled proceedings that the following matters are true:

21 **PARTIES**

22 1. Joanne Arnold (Complainant) is the Acting Executive Officer of the Board for
23 Professional Engineers, Land Surveyors, and Geologists. She brought this action solely in her
24 official capacity and is represented in this matter by Kamala D. Harris, Attorney General of the
25 State of California, by David E. Hausfeld, Deputy Attorney General.

26 2. Respondent David Harlan Lowen (Respondent) is represented in this proceeding by
27 attorney Larry Lushanko, whose address is: 584 Industrial Way, Ste. A, Fallbrook, CA 92028.
28 His telephone number is (760) 728-9899.

1 3. On or about August 14, 1980, the Board for Professional Engineers, Land Surveyors,
2 and Geologists issued Civil Engineer License No. C 31915 to David Harlan Lowen (Respondent).
3 The Civil Engineer License was in full force and effect at all times relevant to the charges brought
4 in Accusation No. 897-A and will expire on December 31, 2012, unless renewed.

5 **JURISDICTION**

6 4. Accusation No. 897-A was filed before the Board for Professional Engineers, Land
7 Surveyors, and Geologists (Board), Department of Consumer Affairs, and is currently pending
8 against Respondent. The Accusation and all other statutorily required documents were properly
9 served on Respondent on January 29, 2010. Respondent timely filed his Notice of Defense
10 contesting the Accusation. A copy of Accusation No. 897-A is attached as Exhibit A and
11 incorporated herein by reference.

12 **ADVISEMENT AND WAIVERS**

13 5. Respondent has carefully read, fully discussed with counsel, and understands the
14 charges and allegations in Accusation No. 897-A. Respondent has also carefully read, fully
15 discussed with counsel, and understands the effects of this Stipulated Settlement and Disciplinary
16 Order.

17 6. Respondent is fully aware of his legal rights in this matter, including the right to a
18 hearing on the charges and allegations in the Accusation; the right to confront and cross-examine
19 the witnesses against him; the right to present evidence and to testify on his own behalf; the right
20 to the issuance of subpoenas to compel the attendance of witnesses and the production of
21 documents; the right to reconsideration and court review of an adverse decision; and all other
22 rights accorded by the California Administrative Procedure Act and other applicable laws.

23 7. Respondent hereby freely, voluntarily, and knowingly waives and gives up each and
24 every right set forth above including, but not limited to, the right to a hearing on the charges and
25 allegations contained in Accusation No. 897-A and the right to reconsideration and judicial
26 review, in order to enter into this Stipulated Settlement. Respondent further waives any other
27 legal claim or defense, including, but not limited to, any time-based claim such as laches, in the
28 event it is necessary to re-calendar an administrative hearing based on any part of or all of

1 Accusation No. 897-A. Respondent understands that, in signing this Stipulated Settlement rather
2 than contesting the Accusation, he is enabling the Board to issue its order without further process.

3 CULPABILITY

4 8. Respondent admits the truth of each and every charge and allegation in the First
5 Cause for Discipline, in Accusation No. 897-A.

6 9. It is stipulated and agreed that Civil Engineering License No. C 31915 issued to
7 Respondent shall, by way of letter from the Acting Executive Officer, be publicly reprovved, with
8 conditions. Said letter of public reprovval will issue as set forth above and shall be in substantially
9 the same form as the sample letter attached hereto as Exhibit B.

10 CONTINGENCY

11 10. This stipulation shall be subject to approval by the Board for Professional Engineers,
12 Land Surveyors, and Geologists. Respondent understands and agrees that counsel for
13 Complainant and the staff of the Board for Professional Engineers, Land Surveyors, and
14 Geologists may communicate directly with the Board regarding this stipulation and settlement,
15 without notice to or participation by Respondent or his counsel. By signing the stipulation,
16 Respondent understands and agrees that he may not withdraw his agreement or seek to rescind the
17 stipulation prior to the time the Board considers and acts upon it. If the Board fails to adopt this
18 stipulation as its Decision and Order, the Stipulated Settlement and Disciplinary Order shall be of
19 no force or effect, except for this paragraph, it shall be inadmissible in any legal action between
20 the parties, and the Board shall not be disqualified from further action by having considered this
21 matter.

22 11. The parties understand and agree that facsimile copies of this Stipulated Settlement
23 and Disciplinary Order, including facsimile signatures thereto, shall have the same force and
24 effect as the originals.

25 12. This Stipulated Settlement and Disciplinary Order is intended by the parties to be an
26 integrated writing representing the complete, final, and exclusive embodiment of their agreement.
27 It supersedes any and all prior or contemporaneous agreements, understandings, discussions,
28 negotiations, and commitments (written or oral). This Stipulated Settlement and Disciplinary

Order may not be altered, amended, modified, supplemented, or otherwise changed except by a writing executed by an authorized representative of each of the parties.

13. In consideration of the foregoing admissions and stipulations, the parties agree that the Board may, without further notice or formal proceeding, issue and enter the following Disciplinary Order:

DISCIPLINARY ORDER

IT IS HEREBY ORDERED as follows:

A Public Reprimand shall be issued to Respondent, David Harlan Lowen, Civil Engineer License No. C 31915. It is further ordered that Respondent shall complete the following required conditions.

A. Within two and one half (2 1/2) years from the effective date of the decision, Respondent shall successfully complete and pass one college level course, specifically related to civil engineering. This college level course must be approved in advance by the Board or its designee. Respondent shall provide the Board with verifiable proof of his successful completion of said college level course.

B. Within two and one half (2 1/2) years from the effective date of the decision, Respondent shall reimburse the Board for its investigative and enforcement costs in the amount of \$3,867.50. Respondent may pay the reimbursement in equal monthly payments subject to approval in advance by the Board or its designee. The filing of Bankruptcy or period(s) of non-practice by Respondent shall not relieve Respondent of his obligation to reimburse the Board for its costs.

C. This Order for Public Reprimand as a resolution to the charges in Accusation No. 897-A is contingent upon Respondent's full compliance with all conditions of this Order. If Respondent fails to satisfy these conditions, the Board can file a supplemental Accusation for unprofessional conduct based upon Respondent's failure to comply with this Order as an independent basis for disciplinary action pursuant to Business & Professions Code section 6775, and reinstate the original Accusation as if never resolved. The Board will be entitled to proceed

1 against Respondent on both the original Accusation and a supplemental Accusation based upon
2 his failure to comply with this Order.

3 D. Upon successful completion of all conditions in this Disciplinary Order Respondent's
4 Civil Engineer License No. C 31915 shall be unconditionally restored.

5 **ACCEPTANCE**

6 I have carefully read the above Stipulated Settlement and Disciplinary Order and have fully
7 discussed it with my attorney, Larry Lushanko. I understand the stipulation and the effect it will
8 have on my Civil Engineer License. I enter into this Stipulated Settlement and Disciplinary Order
9 voluntarily, knowingly, and intelligently, and agree to be bound by the Decision and Order of the
10 Board for Professional Engineers, Land Surveyors, and Geologists.

11
12 DATED: 03/18/11

Original Signed

DAVID HARLAN LOWEN
Respondent

13
14
15 I have read and fully discussed with Respondent, David Harlan Lowen, the terms and
16 conditions and other matters contained in the above Stipulated Settlement and Disciplinary Order.
17 I approve its form and content.

18 DATED: 3/18/11

Original Signed

LARRY LUSHANKO
Attorney for Respondent

ENDORSEMENT

The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully submitted for consideration by the Board for Professional Engineers, Land Surveyors, and Geologists of the Department of Consumer Affairs.

Dated: 3/18/11

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
LINDA K. SCHNEIDER
Supervising Deputy Attorney General

Original Signed

DAVID E. HAUSFELD
Deputy Attorney General
Attorneys for Complainant

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Exhibit A

Accusation No. 897-A

1 EDMUND G. BROWN JR.
Attorney General of California
2 LINDA K. SCHNEIDER
Supervising Deputy Attorney General
3 DAVID E. HAUSFELD
Deputy Attorney General
4 State Bar No. 110639
110 West "A" Street, Suite 1100
5 San Diego, CA 92101
P.O. Box 85266
6 San Diego, CA 92186-5266
Telephone: (619) 645-2025
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10 **DEPARTMENT OF CONSUMER AFFAIRS**
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11 In the Matter of the Accusation Against:

Case No. 897-A

12 **DAVID HARLAN LOWEN**
13 **145 North Melrose Drive, Suite 200**
14 **Vista, CA 92083**

A C C U S A T I O N

15 **Civil Engineer License No. C 31915**

16 Respondent.

17
18
19 Complainant alleges:

20 **PARTIES**

21 1. David E. Brown (Complainant) brings this Accusation solely in his official capacity
22 as the Executive Officer of the Board for Professional Engineers and Land Surveyors,
23 Department of Consumer Affairs.

24 2. On or about August 14, 1980, the Board for Professional Engineers and Land
25 Surveyors issued Civil Engineer License Number C 31915 to David Harlan Lowen (Respondent).
26 The Civil Engineer License was in full force and effect at all times relevant to the charges brought
27 herein and will expire on December 31, 2010, unless renewed.

28 ///

JURISDICTION

3. This Accusation is brought before the Board for Professional Engineers and Land Surveyors (Board), Department of Consumer Affairs, under the authority of the following laws.

All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 6775 of the Code states, in pertinent part,

[T]he board may reprove, suspend for a period not to exceed two years, or revoke the certificate of any professional engineer registered under this chapter:

....

(c) Who has been found guilty by the board of negligence or incompetence in his or her practice.

....

(g) Who in the course of the practice of professional engineering has been found guilty by the board of having violated a rule or regulation of unprofessional conduct by the board.

....

5. Section 118, subdivision (b), of the Code provides that the suspension, expiration, surrender or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated.

STATUTORY PROVISIONS

6. Section 6749 of the Code states, in pertinent part,

(a) A professional engineer shall use a written contract when contracting to provide professional engineering services to a client pursuant to this chapter. The written contract shall be executed by the professional engineer and the client, or his or her representative, prior to the professional engineer commencing work, unless the client knowingly states in writing that work may be commenced before the contract is executed. The written contract shall include, but not be limited to, all of the following:

(1) A description of the services to be provided to the client by the professional engineer.

(2) A description of any basis of compensation applicable to the contract, and the method of payment agreed upon by the parties.

(3) The name, address, and license or certificate number of the professional engineer, and the name and address of the client.

(4) A description of the procedure that the professional engineer and the client will use to accommodate additional services.

1 (5) A description of the procedure to be used by any party to terminate the
2 contract.

3

4 REGULATORY PROVISIONS

5 7. California Code of Regulations, Title 16, section 404.1 states, in pertinent part,

6 (a) As used in the Professional Engineers Act, the term "responsible charge"
7 directly relates to the extent of control a professional engineer is required to
8 maintain while exercising independent control and direction of professional
9 engineering services or creative work and to the engineering decisions which can
10 be made only by a professional engineer.

11 (1) Extent of Control. The extent of control necessary to be in
12 responsible charge shall be such that the engineer:

13 (A) Makes or reviews and approves the engineering decisions
14 defined and described in subdivision (a) (2) below.

15 (B) In making or reviewing and approving the engineering
16 decisions, determines the applicability of design criteria and technical
17 recommendations provided by others before incorporating such criteria or
18 recommendations.

19 (2) Engineering Decisions. The term "responsible charge" relates to
20 engineering decisions within the purview of the Professional Engineers Act.

21 Engineering decisions which must be made by and are the responsibility
22 of the engineer in responsible charge are those decisions concerning permanent or
23 temporary projects which could create a hazard to life, health, property, or public
24 welfare, and may include, but are not limited to:

25 (A) The selection of engineering alternatives to be investigated
26 and the comparison of alternatives for the project.

27 (B) The selection or development of design standards or methods,
28 and materials to be used.

(C) The decisions related to the preparation of engineering plans,
specifications, calculations, reports, and other documents for the engineered
works.

(D) The selection or development of techniques or methods of
testing to be used in evaluating materials or completed projects, either new or
existing.

(E) The review and evaluation of manufacturing, fabrication, or
construction methods or controls to be used and the evaluation of test results,
materials, and workmanship insofar as they affect the character and integrity of the
completed project.

(F) The development and control of operating and maintenance
procedures.

(3) Reviewing and Approving Engineering Decisions. In making or
reviewing and approving engineering decisions, the engineer shall be physically
present or shall review and approve through the use of communication devices the
engineering decisions prior to their implementation.

....

1 8. California Code of Regulations, title 16, section 475 states, in pertinent part,

2 To protect and safeguard the health, safety, welfare, and property of the
3 public, every person who is licensed by the Board as a professional engineer,
4 including licensees employed in any manner by a governmental entity or in private
5 practice, shall comply with this Code of Professional Conduct. A violation of this
6 Code of Professional Conduct in the practice of professional engineering
7 constitutes unprofessional conduct and is grounds for disciplinary action pursuant
8 to Section 6775 of the Code. This Code of Professional Conduct shall be used for
9 the sole purpose of investigating complaints and making findings thereon under
10 Section 6775 of the Code.

11 (a) Compliance with Laws Applicable to a Project:

12 A licensee shall provide professional services for a project in a manner
13 that is consistent with the laws, codes, ordinances, rules, and regulations applicable
14 to that project. A licensee may obtain and rely upon the advice of other
15 professionals (e.g., architects, attorneys, professional engineers, professional land
16 surveyors, and other qualified persons) as to the intent and meaning of such laws,
17 codes, and regulations.

18

19 COSTS

20 9. Section 125.3 of the Code provides, in pertinent part, that the Board may request the
21 administrative law judge to direct a licensee found to have committed a violation or violations of
22 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
23 enforcement of the case.

24 RILEY PROJECT

25 10. In June 2005, D. Riley retained Respondent to create a grading plan and set controls
26 for aerial topographic mapping, for his undeveloped property identified as APN 174-090-52,
27 located in Vista, in the County of San Diego, California. This retention was based upon a written
28 cost estimate dated June 7, 2005 in the sum of \$3,865.00. No written contract was ever prepared
or signed by Respondent and Mr. Riley. Over the course of the next 18 months Respondent
submitted plans to the County of San Diego for approval on four separate occasions, in December
2005, June 2006, October 2006 and December 2006. None of the submittals by the Respondent
were approved by the County. Mr. Riley never received a stamped approved set of plans from the

1 Respondent for the work on the property. Respondent eventually billed Mr. Riley a total of
2 \$13,768.43 for this project and collected \$7,737.40 from Mr. Riley.

3 **FIRST CAUSE FOR DISCIPLINE**

4 **(Negligence in the Practice of Engineering)**

5 11. Respondent is subject to disciplinary action under Code section 6775 (c) in that
6 Respondent was negligent in his practice of engineering regarding the undeveloped property
7 identified as APN 174-090-52, located in Vista, in the County of San Diego, California, as
8 follows.

9 12. The number of rejected plan submittals and the excessive time between submittals
10 show the plans were incomplete and lacked sufficient detail necessary for project approval and
11 were below the standard of care.

12 13. The plans did not comply with the standard of care for plan preparation in that they
13 did not have retaining wall heights and grading catch points.

14 **SECOND CAUSE FOR DISCIPLINE**

15 **(Failure to Maintain Responsible Charge)**

16 14. Respondent is subject to disciplinary action under Code section 6775 (g), for
17 violation of California Code of Regulations, Title 16, section 404.1, in that Respondent did not
18 adequately supervise his associate and was not in "responsible charge" of the Riley project.

19 **THIRD CAUSE FOR DISCIPLINE**

20 **(Failure to Execute a Written Contract)**

21 15. Respondent is subject to disciplinary action under Code section 6749 (a) (3), (4) and
22 (5), in that Respondent did not provide a written contract to his client, Mr. Riley. The cost
23 estimate that was given to the client was insufficient as a contract in that it was not signed by the
24 client and did not provide the following required items:

- 25 (a) Respondent's professional engineer license number was not provided;
26 (b) No procedure was identified to accommodate additional services;
27 (c) No procedure was identified to terminate the contract.

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1. Revoking or suspending Civil Engineer License Number C 31915, issued to David Harlan Lowen.
2. Ordering David Harlan Lowen to pay the Board for Professional Engineers and Land Surveyors the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;
3. Taking such other and further action as deemed necessary and proper.

2/19/10

DAVID E. BROWN
Executive Officer
Board for Professional Engineers and Land Surveyors
Department of Consumer Affairs
State of California
Complainant

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